Can the General Fraud Offence 'Get the Law Right'?: Some Perspectives on the 'Problem' of Financial Crime

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Abstract The Fraud Bill, which received Royal Assent on 8 November 2006, created an offence of fraud in English criminal law which marks a departure of utmost significance from the approach adopted hitherto, whereby a number of related offences cover behaviour deemed to amount to fraud. To mark the passage of the Fraud Act 2006 into law, this article examines the references which were made during its consideration in Parliament to fraud as activity which is serious and which is often erroneously portrayed as 'victimless' crime. In joining these key criminal policy-making debates with academic study of white-collar crime, it will be suggested that as yet too little attention is being paid to 'ambiguous' popular perceptions of financial crimes for there to be confidence that the fraud offence will, in the words of the current Solicitor-General, 'get the law right'.

In 1998 the Law Commission was instructed to 'examine the law relating to fraud . . . and to make recommendations to improve the law . . . with all due expedition'.[1] The resulting Consultation Paper published in 1999 *Legislating the Criminal Code, Fraud and Deception* shows clearly the Law Commission's appreciation that in the 21st century, challenges arising from the 'problem of fraud' owe much to the combination of its base elements of deceit and motivation for securement of advantage or causing loss[2] with the social and economic conditions of the late 20th century, and especially the 'radical and multifarious advances in the use of modern technology'.[3] The Law Commission explained that this presents considerable difficulties for framing law which is able to 'keep up', let alone to stay 'one step ahead', of fraud, as fraudulent activity can and *does* evolve quickly, especially in a fast-changing world.[4] It also stressed that this is a world in which technological advances have ensured electronic means of communication and commercial transaction are commonplace across spheres of everyday life as well as business activity.[5]

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The Fraud Bill received Royal Assent on 8 November 2006. This article was passed for press in late December 2006 and therefore references are to key sections of the new Act, rather than clauses of the Bill before it received Royal Assent.

1 Law Commission, *Legislating the Criminal Code, Fraud and Deception: A Consultation Paper*, Law Com. No. 155 (1999) para. 1.1 (hereafter *Legislating the Criminal Code*).
2 D. Kirk and A. Woodcock, *Serious Fraud: Investigation and Trial* (Butterworths: London, 1997) 1.
3 *Legislating the Criminal Code*, para. 1.3.
4 Ibid. at paras 1.3 and 1.5.
5 Ibid.

Notwithstanding the regulatory challenges arising, the Law Commission was insistent that the consequences of failing to address the problem of fraud in this context would be severe. It illustrated this by reference to the Institute of Chartered Accountants' assessment that 'business fraud is a growing problem that affects everyone . . . [t]he cost to the country is huge in terms of those who have to pay for it and the loss of reputation as a safe place to do business'.[6] The Law Commission was instructed to consider whether existing law relating to fraud was comprehensible to juries; adequate for effective prosecution; and fair to potential defendants, but also explicitly whether it met 'the need of developing transfers', to determine whether it was sufficiently flexible to be applicable to new scenarios.[7] The accompanying instruction to make recommendations with all 'due expedition' included the direct request that it consider the merits of introducing a general offence of fraud into English criminal law. This commenced the extensive inquiry into the criminal law relating to fraud which culminated in the Fraud Bill which was first introduced in Parliament in May 2005, following recommendations made in the Law Commission's *Report on Fraud* published in 2002,[8] and government consultation in 2004.[9] Following further parliamentary consideration during 2006, the Bill which stated in its preamble that it was to 'make provision for, and in connection with criminal liability for fraud and obtaining services dishonestly',[10] received Royal Assent on 8 November 2006.

For criminal lawyers, the Fraud Act's main import lies in the way in which it will fundamentally alter the approach to financial crime traditionally adopted in criminal law. Solicitor-General Mike O'Brien told the House of Commons in June 2006 that the Bill is a measure which has been eagerly awaited by prosecutors and by the police, and this was because it 'should improve the prosecution process by reducing the chance of offences being wrongly charged, and provide greater flexibility to keep pace with the increasing use of technology in crimes of fraud'. In contrast Mr O'Brien also made reference to the way in which 'strange as it may seem . . . [w]hen lawyers talk of fraud, we refer collectively to a wide and complex array of deception and theft offences . . . and common law, [which] compiled somewhat haphazardly, have the task of encompassing the wide range of fraudulent conduct'.[11] Alluding to the absence of any offence *of* fraud either under statute or at common law, this need for a new approach was recognised by the Law

6 Ibid. at para. 1.9.
7 Ibid. at para. 1.1.
8 Law Commission, *Report on Fraud*, Law Com. No. 276, Cm 5560 (2002) (hereafter *Report on Fraud*).
9 *Fraud Law Reform—Consultation on Proposals for Legislation* launched by Baroness Scotland on 17 May 2004, and *Fraud Law Reform: Government Response to Consultations* published in October 2004.
10 The full text of the Fraud Act 2006 can be found at *www.opsi.gov.uk/acts/acts2006/60035--a.htm#1*.
11 *Hansard*, col. 534, 12 June 2006.

Commission in its insistence in 2002 that the law was in need of reform, and that a 'Fresh Approach' was required.[12]

In the course of emphasising the need to thwart the 'inexhaustible ingenuity' of fraudsters,[13] in 2002 the Law Commission proposed that pursuing reform through specific offences was likely to continue the position whereby the law would be 'always lagging behind developments in technology and commerce'.[14] Following government consultation and parliamentary debate, the Fraud Act's 'centrepiece' offence mirrors closely the Law Commission's recommendations for a statutory general fraud offence.[15] The offence seeks to capture base elements of fraud, but to do so in a manner which is deliberately not attached to any specific activity which might arise from the 'modern methods by which dishonest activity may be effected'.[16] And accordingly, what are now ss 1–5 of the Fraud Act provide that a person is guilty of fraud if he *dishonestly* makes a false representation;[17] fails to disclose information while under a legal duty to do so;[18] or abuses a position in which he is expected to safeguard or at least not to prejudice the financial interests of another,[19] and in the commission of any of these matters intends to make a gain or expose another to loss.[20]

The scope of the Fraud Act and its intended function and purpose

Although this article is most interested in the fraud offence, the scope of the Fraud Act is wider, and includes the offence of obtaining services dishonestly which is also intended to apply widely across commercial and everyday life activities.[21] There is also liability for being in possession of articles for use in frauds, and making or supplying articles for use in frauds.[22] The new offence of 'Participating in a fraudulent business carried on by a sole trader' intends to extend liability which can already

12 This is the heading adopted in Part VI of the Law Commission's *Report on Fraud*, at 57.
13 *Report on Fraud*, para. 7.1.
14 Ibid. at para. 7.3.
15 See Solicitor-General Mike O'Brien's observations on the way in which most of the changes proposed by the Law Commission had 'found their way into the Bill': *Hansard*, col. 534, 12 June 2006.
16 Lord Falconer of Thoroton 'Commercial Fraud or Sharp Practice—Challenge for the Law', Denning Lecture (14 October 1997), quoted in *Legislating the Criminal Code*, para. 1.3.
17 Further illumination of false representation can be found in s 2 of the new Act, and in the Explanatory Notes which accompanied the Bill (published by the Home Office (29 March 2006)).
18 Further illumination of disclosure while under a legal duty can be found in s. 3 of the Act and Explanatory Notes published in relation to the Bill.
19 Further illumination of abuse of position can be found in s. 4 of the Act, and the Explanatory Notes.
20 According to s. 5 'gain' and 'loss' extend only to that of money or other property, but include gain or loss which is temporary or permanent. It explains that 'gain' includes a gain achieved by keeping what one has as well as gaining that which one does not; and 'loss' includes a loss by not getting what one might get as well as loss by parting with what one has.
21 See the provisions of s. 11, and the Explanatory Notes, paras 34–36.
22 Pursuant to ss 6 and 7 respectively.

be incurred in respect of a company, where a business is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose.[23] Penalties across the new Act reflect current political concerns for the need to address the way in which, according to former Lord Chancellor Lord Irvine, '. . . the public has at times felt that those responsible for major crimes in the commercial sphere have managed to avoid justice'.[24] This sentiment in turn echoed the views of Lord Roskill from over a decade earlier that the way in which serious fraud appeared to escape detection or successful prosecution had served only to 'encourage its growth, with potentially harmful consequences'.[25] The Fraud Bill matches the substantive law with the consequences of allowing the perpetration of fraud to flourish by providing that the fraud offence will carry a maximum penalty of 10 years' imprisonment for those convicted on indictment.[26]

This is clearly a strong message against tolerance of fraud, but equally, during its consideration before Parliament, ministers were very keen to clarify that the Fraud Bill was part of a much more extensive and more ambitious package of measures to combat fraud. According to the Solicitor-General, the aim of the Fraud Bill was to 'get the law right'[27] but that, alongside this, the government is equally concerned with improving the investigation of fraud by the police and other agencies,[28] and ensuring that the criminal courts are able to deal effectively and expeditiously with trial proceedings.[29] While accepting that the fraud offence—and even the Act within which it is now located—is not intended to be a 'standalone' initiative, this article is concerned with whether the new fraud offence will be able to 'get the law right'. It will open up some thoughts on whether the fraud offence can be expected to deliver an effective, widely applicable, and yet flexible mechanism for determining criminal liability for fraud. In this spirit, it is particularly interested in the issues which might arise from the manner in which it will be established that a defendant—in making a false representation; in failing to disclose information; or by abusing a position of trust—has committed fraud. The transformation of this conduct into criminal fraud

23 According to s. 458 of the Companies Act 1985, 'If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who was knowingly a party to the carrying on of the business in that manner is liable to imprisonment or a fine, or both. This applies whether or not the company has been, or is in the course of being, wound up.' The new offence regarding sole traders is to be found in s. 9 of the new Act.

24 Lord Irvine, quoted in *Legislating the Criminal Code*, para. 1.4.

25 *Fraud Trials Committee Report*, chaired by E. Wentworth, Bart., Lord Roskill (HMSO: London, 1986) 2.

26 According to s. 1(3), a person found guilty of fraud is liable on summary conviction to imprisonment of up to 12 months and or to a fine up to the statutory maximum; or upon conviction on indictment to imprisonment of up to 10 years or to a fine or both.

27 *Hansard*, col. 535, 12 June 2006.

28 Ibid. The Solicitor-General also informed Parliament that this was currently the subject of a review being led by the Attorney-General.

29 Ibid. This address also made reference to government appreciation of controversies surrounding non-jury trials.

will require proof of dishonesty.[30] This is to be a question for fact-finders, either juries or judges in the small number of fraud trials which will be destined for judge-only trials (pursuant to s. 43 of the Criminal Justice Act 2003), and to be determined according to the test laid down in *R* v *Ghosh*.[31]

Shortly after the Fraud Bill's initial presentation in Parliament in 2005 it was suggested that, for a number of reasons, fact-finders may experience difficulties in finding that a defendant charged with fraud has acted dishonestly.[32] This proposition was based upon the discussion of issues pertaining to criminalising business activity, and also those arising in respect of 'everyday-life crime'. This present discussion seeks to build on these foundational ideas by pointing to the significance for this debate on law reform of the academic study of white-collar crime, which has grown from the work of Edwin Sutherland. During the 1940s, Sutherland coined the term 'white-collar crime' while studying criminal behaviour amongst professional classes, which could not be explained by established theories which linked crime with poverty and its associated pathologies.[33] Sutherland's most famous and controversial legacy is his definition of 'white collar crime' as 'crime committed by a person of respectability and high social status in the course of his occupation'.[34]

Today, scholars continue to be fascinated by white-collar crime, and it has been suggested elsewhere that this richly textured and multidisciplinary literature could have made a valuable contribution to the otherwise lengthy consideration of fraud and the criminal law set in motion in 1998.[35] Indeed, the Law Commission's understanding of the 'problem' of fraud unveiled in 1999 mirrors almost exactly scholars' views that 20th-century technological advances have transformed elemental ideas of deceit which are as 'old as ancient Egypt'[36] into the 'modern crime *par excellence*'[37] by inviting new types of crime, and also making 'old kinds of crime more freely available'.[38] Beyond this, the value of this body of literature for enriching understandings of the 'problem' of fraud is considerable. This is on account of its intellectual consideration of the

30 *Report on Fraud*, para 7.3.
31 [1982] QB 1053. According to *Ghosh* conduct is dishonest if it is found that ordinary people would regard it as such, and also that the defendant knew that ordinary people would so regard it. *Ghosh* is a mechanism for the 'ordinary standards of reasonable and honest people' to inform what is regarded as criminal conduct, and is thus a way of ensuring that law and morality map coherently on to one another.
32 See S. Wilson, '"Collaring" the Crime *and* the Criminal?: "Jury Psychology" and Some Criminological Perspectives on Fraud and the Criminal Law' (2006) 70 JCL 75–92.
33 See S. Shapiro, 'Collaring the Crime, Not the Criminal: Reconsidering the Concept of a White-Collar Crime' (1990) 55 *American Sociological Review* 346 at 346–7.
34 E. H. Sutherland, *White Collar Crime* (New York: 1949) 9.
35 Indeed, it was suggested in Wilson (above n. 32) that there was no evidence to suggest that any attention had been paid to the academic study of white-collar crime during the Fraud Bill's genesis or its initial appearance in Parliament.
36 A. Bequai, *White Collar Crime: A 20th Century Crisis* (Massachusetts, 1978) Preface iii.
37 M. Levi, *Regulating Fraud: White Collar Crime and the Criminal Process* (Tavistock Press: London, 1987) 1.
38 Ibid. at 3.

destructive capabilities of white-collar crimes; their 'ambivalent' nature, and also the related ambiguities surrounding their 'respectable' perpetrators. More specifically, there appears to be within this literature base substantial support for the authors' concerns that the fraud offence may not necessarily be able to increase effectiveness in criminal responses as intended, and as believed by many.

The Fraud Bill's original reception in Parliament was as a 'model piece of law reform',[39] and the optimism for the fraud offence within it continued throughout the Bill's journey through both Houses during 2006. Indeed, the tenor of the Solicitor-General's address noted above was very much that the Act *will* get the law right. At one level there clearly are grounds for confidence, because fraud will actually be a criminal offence in its own right, and, as recommended by the Law Commission, will not be attached to identifying 'specific types of dishonest behaviour as deserving of criminality'.[40] Moreover, notwithstanding the offence's general nature, it *does* provide fact-finders with a conduct-based framework for applying *Ghosh*.[41] Further encouragement can also be drawn from the way in which that, as the technical detail of the offence (and indeed the other offences within the Bill) were worked through, parliamentary debate during 2006 *did* emphasise the offence's significance and its potential radically to alter approaches to fraud. Although this was the case during its initial reception in 2005, it was suggested at the time that debate was too focused on the technical aspects of the offence, and insufficient attention was being paid to 'wider perspectives' on the seriousness of fraud.[42] Not only was parliamentary discussion of the seriousness of fraud during June 2006 the fullest which had occurred at any stage of the Fraud Bill's genesis, but its 'wider' implications were at that stage also insightfully being attached to the way in which the government is seeking to formulate a coherent strategy to 'reduce the incidence of fraud and the harm to which it can lead'.[43]

Furthermore, there did appear at this latter stage to be appreciation in both Houses of popular perceptions which regard fraud as a 'victimless' crime. However, what has not attracted any attention is what might actually inform conceptions of financial crimes as ones which are 'victimless', beyond frequent but also fleeting reference to their secretive nature and apparent lack of victim, and in some cases—for example, in an insurance fraud—comparatively easy pecuniary gain. While there is some appreciation of *why* it is important to break down conceptions that fraud may be 'victimless', this is occurring largely without any reference to *how* such perceptions have come into being. At one level it might not

39 See Wilson, above n. 32.
40 *Report on Fraud*, para. 7.2.
41 Contrast the Law Commission's assessment (*Report on Fraud*, para. 1.6) of the then current position in which none of the numerous charges that are brought in relation to fraud 'adequately describe or encapsulate the meaning of "fraud" in circumstances where it falls to a jury to determine whether the defendant has been dishonest'.
42 Wilson, above n. 32.
43 *Hansard*, col. 545, 12 June 2006.

be difficult to see how insurance fraud or that associated with obtaining credit facilities[44] might appear 'victimless', but appreciation of how and why conceptions of 'harm' may be absent from popular understandings of financial crimes is more complex than this alone. There is much evidence that British society has a highly ambivalent relationship with non-violent crimes of financial dishonesty, particularly ones perpetrated by respectable people, and this appears to overarch mixed perceptions of victimisation and harm arising from fraud. This dimension appears to have been absent from parliamentary discussions at all stages, and it is in this light that reference to criminological study of white-collar crime can reveal how important British societal understandings of 'respectable crime' are to these critical policy debates.

Criminological study and popular perceptions of crime: a lesson for fraud law reform

The work of Edwin Sutherland shows at one level how financial crimes fit within a broader intellectual appreciation of white-collar crime. Sutherland proposed that many of '[t]he varied types of white collar crimes in business and the professions . . . can be reduced to two categories', the first of which was 'misrepresentation of asset values' which approximated with 'fraud or swindling'.[45] Today, within this literature base, white-collar crime is frequently presented as crime of ambiguity and ambivalence.[46] This is readily apparent in representations of scholars that it is 'less' deserving of the label of 'crime' than other types of criminality, and even that the '[t]he Jekyll-and-Hyde nature of crimes committed by the respectable raises questions unlike those posed by other types of criminal behaviour'.[47] Equally the literature alludes to activity perceived as being more dangerous than other types of crime, and even *more criminal* because its impact upon society dwarfs that of other criminal behaviour. In this vein, a large body of work identifies the huge pecuniary costs arising from white-collar crime which, unlike many other so called 'ordinary crimes', victimises universally, silently and indiscriminately.[48] However, beyond this, scholars also speak of the way in which inappropriate societal complacency has led to the emergence of a dual system of justice and even 'divided' societies. This

44 These were illustrations of 'everyday-life' crime, also christened 'respectable opportunism' in S. Karstedt and S. Farrall, 'The Moral Maze of the Middle Class: The Predatory Society and its Emerging Regulatory Order' in H. J. Albrecht, T. Serassis and H. Kania (eds), *Images of Crime II: Representations of Crime and the Criminal in Politics, Society, the Media and the Arts* (Max Planck Institute: Freiburg, 2004), which was utilised in Wilson, above n. 32 at 88.

45 E. H. Sutherland, 'White Collar Criminality' (1940) 5 *American Sociological Review* 1 at 3: the other category amounted to crimes of corruption or 'duplicity in the manipulation of power'.

46 See V. Aubert, 'White Collar Crime and Social Structure' 58 *American Journal of Sociology* (1952) 263 at 266, and D. Nelken, 'White Collar Crime' in M. Maguire *et al.* (eds), *The Oxford Handbook of Criminology* (Oxford University Press: Oxford, 1994) 355 at 377.

47 Ibid. at 355.

48 See citation of G. S. Green, *Occupational Crime* (Nelson Hall: Chicago, 1990) in Nelken, above n. 46 at 358, and also Bequai , above n. 36 at 4.

reasoning proposes that the operation of dual systems of justice, with one 'for the masses, who commit traditional offenses, and the other for a small select group of white-collar felons',[49] has led to societal divisions which are as marked and as damaging as ones arising on grounds of race.[50] Notwithstanding that the literature points to huge differences in opinion on the status and impact of white-collar crime, it is almost universally represented as crime which does not 'fit' comfortably into societal consciousness.

Thus much scholarly energy has been directed towards exploring these activities, and their perpetrators who according to Sutherland frequently 'do not conform to the popular stereotype of "the criminal"', and who (rightly or wrongly) are not seen as 'criminals in the usual sense of the word'.[51] Furthermore it is also the case that more 'popular' opinion on non-violent financial crimes is equally 'mixed', and many direct and implied references are made by scholars to much more fixed opinions on other more traditional types of crime. Michael Levi's socially superior 'businessman criminal'[52] serves as illustration, and while others speak of the 'myth' of *tolerance* of white-collar crime,[53] their work also reveals highest levels of *intolerance* being attached to crimes involving death or serious physical injury.[54] However, the classic study by Stanton Wheeler *et al.* from 1982 illustrates the repugnance which can be directed towards people who commit crimes arising from greed, especially those who are pillars of respectable communities.[55] This latter sentiment can be found in more popular discourses which represent convicted businessmen as 'thieving millionaires'.[56] However, it is also the case that while for some there will be outrage that there can appear to be 'one law for the rich',[57] for others these activities will be seen as 'victimless' and lacking real harm, notwithstanding the elevated (and even superior) position of their perpetrators, serving as a reminder of how differently financial crimes are capable of being perceived.

This proposition of ambivalent societal perception is at the heart of problems which might arise in securing convictions for fraud under the new fraud offence. For example, it has already been suggested that 'jury

49 Bequai, above n. 36, at 4.
50 Ibid.
51 E. H. Sutherland, 'Is "White Collar Crime" Crime?' (1945) 10 *American Sociological Review* 132 at 137.
52 M. Levi, *The Royal Commission on Criminal Justice: the Investigation, Prosecution, and Trial of Serious Fraud* (HMSO: London, 1993) 66. See also Wilson, above n. 32.
53 J. B. Braithwaite, P. N. Grabosky and P. R. Wilson, 'The Myth of Community Tolerance toward White-Collar Crime' (1987) 20 *Australia and New Zealand Journal of Criminology* 33.
54 Ibid. at 38–42. This included alongside violent homicide and 'domestic' violence injuries industrially induced deaths and injuries and heroin trafficking. For a consideration of burglary in this light, see the reference to R. Sparks, H. Genn and D. Dodd, *Surveying Victims* (Wiley: Chichester, 1977) in Levi, above n. 37 at 63, where it is proposed that 'pound for pound, burglary is seen as being more serious than embezzlement or cheque fraud'.
55 S. Wheeler, D. Weisburd, and N. Bode, 'Sentencing the White Collar Offender: Rhetoric and Reality' (1982) 47 *American Sociological Review* 641.
56 M. Levi, 'Sentencing White Collar Crime in the Dark?: Reflections on the Guinness Four' (1991) 28(4) *Howard Journal of Criminal Justice* 257 at 265.
57 Ibid.

psychology' (a term for the difficulties which can arise for juries in their decision-making) might create concerns about determining that a 're-spectable opportunist' or businessman who is 'socially superior' has acted dishonestly.[58] It has also been noted that the new law might also tap into judges' anxieties about white-collar criminals. A number of studies, including that of Wheeler *et al.*, found that judges experienced considerable difficulty in punishing those who have led otherwise exemplary lives as trusted and respected members of communities, but whose fraudulent behaviour has often violated the very trust and esteem underpinning this.[59] Although regard is given to an offender's previous record (or absence of it) across sentencing practice and across the spectrum of criminal activity, in order to ensure 'proportionality and . . . that the appropriate sentence is delivered for the offence that was committed',[60] Levi's UK work suggests that 'sentencing white-collar crimes committed by people with no prior convictions' might place particular pressure on judges. This is on account that such cases raise 'in an acute form conflicts between principles of social equity and *general* deterrability, on the one hand, and *individual* deterrence or rehabilitation on the other'.[61]

In this vein, Levi also alluded to judges being sensitive to 'prospective media and social criticism' because of fears that any perceived 'excessive leniency' will undermine public beliefs about the fairness of law.[62] This could also point to discomfort being closely connected with *judicial* consciousness of ambiguities in more *popular* perceptions of white-collar crimes and their perpetrators. On this reasoning, judicial sensitivity is also likely to be shaped by the way in which notwithstanding the destructive capabilities of financial crimes, popular perceptions do not always align fraud with 'serious crime', and this is likely to be heightened further for those who become 'fact-finders' in fraud trials. In these circumstances, judges will be even more acutely aware of perceptions (and especially ambivalent and unsettled ones) that fraudsters have too much in common with 'respectable people', and their activities run too closely to too many respectable lives for there to be unqualified endorsement that they must be 'investigated as criminals, tried as criminals and punished as criminals', as former Serious Fraud Office director Rosalind Wright insists fraudsters must be.[63]

58 *Report on Fraud*, paras 5.41–5.44. This was of course the core argument in Wilson, above n. 32.
59 Wheeler *et al.*, above n. 55.
60 Solicitor-General, Mike O'Brien addressing the House of Commons, *Hansard*, col. 537, 12 June 2006.
61 Levi, above n. 56 at 257.
62 Ibid. at 257–8. According to Levi judges may also fear that perceived 'excessive lenience' will also undermine the efforts of the SFO and the UK's reputation as a regulatory environment which does not tolerate fraud.
63 R. Wright, 'Fighting Fraud in the UK—The Interaction of the Criminal and the Regulatory Process' at the Financial Regulation Industry Group Reception, 25 May 2000, London.

Academic discourses and real issues: can the fraud offence 'get the law right'?

Although there are a number of possible readings of the 'problem' of fraud, it is a serious problem, and throughout 2006 ministers, Members and peers were keen to stress that it is a mistake to view it as a 'victimless' crime. Thus, the new package of responses—of which the fraud offence forms part—*is* very important, as the latter parliamentary debates clearly did appreciate. However, it is also vital that the new responses are accompanied by emphasis on changing perceptual appreciations of it. Although there is some recognition of this in articulations of the fallacy of 'victimless crime', this has not been linked explicitly with underlying lack of consensus on the 'problem' of fraud. In this climate, the fraud offence is in danger of becoming a dead letter unless British society becomes more prepared to acknowledge both that business people are capable of being criminals, and accept that the activities of respectable middle class 'opportunists'—such as insurance fraud—can be economically and socially injurious, and are not acceptable. Unless there is societal acceptance that fraud needs to be treated as behaviour to which criminal processes and consequences attach, then fraud under the fraud offence is in danger of becoming what Michael Ashe QC coined, in the context of insider dealing, 'convictionless' crime.[64]

In considering how to proceed with clarifying perceptions of financial crime to allow the fraud offence to work, it is very important to be aware of academic considerations of whether white-collar crimes are different from other types of crime qualitatively, and are appropriately regarded as being 'less criminal' than activities more readily regarded as criminal activities. This also requires appreciation of alternative reasoning that it is not qualitative distinctiveness which is responsible for more equivocal feelings towards financial crime, but social constructions which have created a 'smokescreen' based on prejudice and misunderstanding.[65] This latter proposition suggests that societal opinion on white-collar crime is less settled not simply because the secretive nature of fraud makes it less visible than other crimes,[66] but because for activities detected, criminal enforcement is frequently the 'road not taken',[67] which in turn for many is a reflection of socio-political indifference.[68]

64 T. M. Ashe and L. Counsell, *Insider Trading* (Tolley: London, 1993) 17. Although this work is specifically a study of insider dealing, many of its authors' observations can be applied more generally across the spectrum of 'respectable crime'. Most significantly, in the context of this article, Ashe explicitly connects 'convictionless crime' with conduct perceived as being 'victimless'.

65 A thoughtful and balanced presentation of both positions can be found in Nelken, above n. 46.

66 Levi, above n. 37 at 6 makes reference to the 'dark figure' of 'fraud and unprosecuted fraudsters'. See also 'dark figure' observations in M. Levi, 'Regulating Fraud Revisited' in P. Davies, P. Francis and V. Jupp (eds), *Invisible Crimes: Their Victims and their Regulation* (MacMillan: Basingstoke, 1999) 143.

67 S. Shapiro, 'The Road Not Taken: The Elusive Path to Criminal Prosecution for White Collar Offenders' (1985) 19 *Law and Society Review* 179.

68 Bequai, above n. 36, Preface.

Awareness of these perspectives is essential for appreciating that perceptions of financial crimes are very mixed, and in some respects actually conflicted.

However, as part of this, there must also be understanding of the way in which British society has a long-standing ambivalent relationship with non-violent financial crimes, and especially those committed by 'respectable people'. This relationship with criminal activities commonly found collected under the common parlance of 'fraud' is one which appears to have lacked clarity and comfort since the Victorian discovery of financial crime. This proposition can itself be couched within British societal attitudes towards crime which emerged at the beginning of the 19th century. Historians of crime have long proffered the view that for society at this time crime was the province of the dangerous 'criminal classes' (in contemporary parlance a euphemism for the lower classes) who were 'antithetic of every respectable community'.[69] Significantly, these *societal* perceptions of crime and deviance were very strongly influenced by the pertaining *political* climate of the early 19th century. This climate advocated movement away from traditional approaches to crime which rested on community-based policing which was characteristically non-intensive[70] (manifesting a high community tolerance of low level and typically 'petty' crimes[71]), but set against the backdrop of the extensive Bloody Code of criminal laws, which provided capital punishment for large numbers of crimes.[72]

In light of industrialisation, and pressures arising from growing doubts on the deterrent effect of the Bloody Code, and also the Enlightenment-influenced humanitarian movement for reform, fundamental alterations to the relationship between crime policing and punishment started to occur during the early years of the 19th century. The 'revolutions' in policing[73] and penal policy[74] were strongly influenced by Sir Robert Peel's input as Home Secretary, and were a crucial element of

69 See U. Henriques, 'The Rise and Decline of the Separate System of Prison Discipline' (1972) 54 *Past and Present* 61 at 83.

70 See, e.g., C. Emsley, *Policing in its Context* (MacMillan: Basingstoke, 1983) 20, and especially at 28.

71 Ibid. And indeed, this was an important trade off for non-invasive policing which was deep rooted in 18th-century British psyche, as was its underlying suspicion of anything which might interfere with English liberties (namely, anything associated with England's traditional enemy France, and not least its notorious *gens d'Amérie*).

72 It is also the case that a range of secondary punishments—including transportation and 'physical' punishments of whipping, branding and pillory, etc.—operated alongside the capital sanction. Further illumination of this, and the way in which considerable and ever-increasing reliance was being placed on the *threat* of the capital sanction to deter the commission of crime can be found in D. Eastwood, *Governing Rural England: Tradition and Transformation in Local Government 1780–1840* (Clarendon Press: Oxford, 1993) especially 190–209 and 253–4.

73 See D. J. V. Jones, 'The New Police: Crime, and People in England and Wales, 1829–1888' (1983) 33 *Transactions of the Royal Historical Society* 161, and also C. Emsley, 'The Bedfordshire Police 1840–1856: A Case Study in the Working of the Rural Constabulary Act' (1982) 7 *Midland History* 73 especially at 80–6.

74 For example, see U. Henriques, above n. 69, and also M. Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution* (Cambridge University Press: Cambridge, 1980). More recently there is also M. Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England 1830–1914* (Cambridge University Press: Cambridge, 1990).

his commitment to dismantling the Bloody Code and putting in place the foundations of modern criminal law and accompanying frameworks of criminal culpability.[75] Increasing the translation of crimes committed into crimes punished was key to this new approach, at the heart of which was efficiency in policing, but this was also highly controversial in a society which held dear the liberties of the 'free-born Englishman'. What flowed from this was political appreciation of the need to convey that crime was a growing and increasingly ubiquitous problem.[76] Beyond Peel's reforms, reforming bureaucrat Edwin Chadwick continued to emphasise, most famously as an advocate of modernising policing during the 1830s, that crime was a problem for every respectable community.[77]

However, it is also the case that during the 1840s Victorian society became acquainted with what contemporary financial commentator D. M. Evans christened 'high-art crime'. Evans remarked that following the 1840s market crash resulting from over-speculation in railway companies '[the offences of] fraud and forgery and misappropriation' were 'called into existence', along with their 'frightful and heavy legal responsibilities'.[78] However, although Evans was clearly appalled by the unifying motivation to 'make money easily and in a hurry', harboured by all from 'the gigantic forger or swindler' who wished to outshine those around him to the 'reckless speculator' prepared to 'risk everything in the hope of sudden gain, rather than toil safely for a distant reward' and even the apprentice boy who robbed a few shillings from the till 'so that he may enjoy himself on a particular evening'[79] other parts of his commentary on 'the inauguration, development, and rapid progress' of high-art crime[80] reveal quite different reactions. This is because Evans also alluded to this being a 'distinct' type of crime motivated by factors other than poverty and adversity associated with the 'criminal classes'.

Evans insisted that the perpetrators of high-art crime were not like the 'many thousands, unfortunately in every large community who are born, bred and nurtured into crime, and who resort to it naturally and from necessity'.[81] High-art criminals were instead induced by temptation to tamper with the weighty trusts reposed in them, and many did so in order to fund extravagant lifestyles. Evans also recognised that temptation could arise from the desperation of a businessman on the brink of financial ruin, but he believed these occurrences were frequently the

75 See A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Widenfield and Nicholson: London, 1993) especially at 83–4. More extensive consideration of the impact of the *19th-century* politicisation of crime and deviance upon current perceptual appreciation of financial crimes, in light of *current* political policy on financial crime is being made elsewhere (see below n. 107).

76 See S. Wilson, *Invisible Criminals?: Legal, Social and Cultural Perspectives on Financial Crime in Britain 1800–1930* (unpublished doctoral thesis, 2003).

77 Jones, above n. 73.

78 D. M. Evans, *Facts, Failures and Frauds: Revelations Financial, Mercantile, Criminal* (Groombridge: London, 1859) 5.

79 Ibid. at 1–2.

80 Ibid. at 1.

81 Ibid. at 391.

result of indulgence in 'ill-considered enterprises',[82] and on one occasion declared that 'no crime can be more heinous against society . . . than a breach of mercantile trust'.[83] Thus, notwithstanding his own 'ambiguities', Evans did in many respects believe that while capable of being 'heinous', high-art crime was also something quite distinct from what writers of a modern persuasion might call 'ordinary' crime or 'traditional' crime.

Current difficulties and long-standing attitudinal patterns

According to historian Martin Wiener, financial crimes were amongst a number of new crimes discovered in the 19th century which implicated the respectable in ways which traditional crimes rarely had.[84] However, unlike Wiener's other examples of poisoning and blackmail, financial crimes would present particular challenges, because according to Edwin Chadwick they were 'divested of animosity on the part of the offender, of physical injury and physical alarm to the party defrauded'.[85] In 1839 Chadwick suggested that the recently observed increase in fraudulent crimes had accompanied a recorded decline in violent crimes, and this signalled a less barbarous society. Violent crimes were of course at the extreme end of Chadwick's 'one great criminal profession', to which 'habitual depredators' such as '[t]hieves, prostitutes, &c, seem to belong',[86] through which he communicated his warnings about the dangers of crime. Thus, alongside and against such activities it is not difficult to see that fraudulent crimes might have appeared less concerning.

However, Chadwick also intimated that fraudulent crimes may not actually require the same responses as the '[t]hieves, prostitutes & c' who—violent or otherwise—were the scourge of respectable communities, because such activities 'yield more readily to available remedies, in the shape of obstacles which may be interposed to render the offence more difficult, dangerous and unprofitable'.[87] Thus distinctions between 'traditional' crime and 'other' types of deviance were being discussed by criminal policy-makers even prior to the market crash of the 1840s. This is highly significant because the events of the 1840s appear to have been critical in creating perceptual awareness that financial crimes were capable of amounting to 'infamous' crime, which if allowed to go unpunished 'would be a disgrace to the law of any country'.[88] Nevertheless, in these earlier years there was suggestion that fraudulent

82 Ibid.
83 Ibid. at 123.
84 Wiener, above n. 74 at 244.
85 *Report from the Royal Commission on the Constabulary Force*, P. P. 1839 XIX (169) 49 (hereafter *Rural Constabulary Report*).
86 *Rural Constabulary Report*, 8 and 15.
87 Ibid. at 49.
88 In the words of Lord Campbell, presiding over the trial of the directors of the Royal British Bank at the Central Criminal Court, 1858. See S. Wilson, 'Law, Morality, and Regulation: Victorian Experiences of Financial Crime' (2006) 46 *British Journal of Criminology* 1073–90.

activities did not necessarily require the same responses as the activities of 'habitual depredators'.

In the criminal trials which followed the aftermath of the railway boom there is much which is interesting about the ways in which prosecutors actively pushed the proposition of criminal liability for 'business crime'. It is, for example, apparent from the earliest fraud trials how the proceedings reflected key concerns of business failure and the limits of legitimate risk-taking and acceptable business conduct, as Victorian society struggled with the implications of a developing, and highly dynamic and also little-regulated capitalist economy. It is also interesting to see how alongside this, the proceedings also became extensive discussions of expectations pertaining to *occupational* conduct arising from *personal* morality, pursued through reference to defendants' respectability and esteem.[89] Both these themes are of course dominant in discourses today: forming the basis of contentions that white-collar crime is different from other types of crime and this has to be reflected in approaches to it, but also others which suggest that it is inappropriately treated as 'lesser crime' or 'not real crime'. But for the purposes of this discussion on ambiguous perceptions of white-collar crime, the trials also reveal judges trying to reason and explain the occurrence of activity which while it was unacceptable in many respects did not really 'fit' comfortably into prevailing societal stereotypings of crime and deviance.

Dating from times when Enlightenment associationalist ideologies were dominant within penal thought and policy, proffering that crime was not a product of birth, but instead a product of social dysfunction (people were not born evil, they were instead made evil by society[90]) judges in the earliest fraud trials explored the ways in which business crimes committed by respectable people—while capable of being 'infamous' and warranting punishment—could be very different from ones which were rooted in poverty and hostile social conditions. The trial of London bankers Strahan, Bates and Paul in 1855 for their embezzlement of moneys entrusted to them as bankers reveals how, in these proceedings, financial dishonesty was often contrasted with the activities of those described as 'common felons', and from 'lower conditions of life'.[91] Although the prisoners were sentenced to transportation for a period of 14 years following their conviction for a crime described by presiding Baron Alderson as the most serious which could be imagined in a 'great commercial community like this', the judge described his duty to pass sentence as a painful one because prior to appearing before him 'in the prisoners' dock' they had once 'moved in a position of society'. Furthermore, when pronouncing sentence upon Joseph Windle Cole for dockyard warrant frauds perpetrated in 1854, Lord Chief Baron Pollock compared Cole's conduct with: '[t]he dishonest acts of many thousands

89 Ibid. for fuller consideration of both themes.

90 See Ignatieff, above n. 74.

91 The Trial of Strahan, Bates and Paul (1855) at the Central Criminal Court, London on charges relating to their embezzlement of moneys entrusted to them as bankers, as fully transcribed in Evans, above n. 78 at 125–45.

who have poverty, want, bad education and worse bad example as possibly some extenuation of their offences'. He alleged that this made Cole's crimes, committed out of self-interest '[a]mongst the worst that can be brought under the notice of a court'.[92]

This comment proposed that crimes committed out of *greed* were more reprehensible than crimes committed out of *need*, but a distinction between them was nevertheless drawn. It is highly likely that this Enlightenment-influenced commentary contributed to strengthening opinion that crimes of deceit and dishonesty in pursuit of greed and self-promotion were socially injurious, and possibly especially reprehensible.[93] Equally it was becoming apparent in the same discourses that such activities committed by those who had been *reduced to* the position of 'common felons' would not obviously be regarded in the same way as crimes committed by those *who were* common felons and these situations were *somehow* different. Then as now, there was 'strong sentiment against crimes of greed rather than need, against crimes committed by persons in positions of trust and authority',[94] while definite references were also made to crime which was not necessarily the 'same as' that arising from 'lower conditions of life' and which may not necessarily require the same responses.

Over 50 years after these earliest fraud trials from the 1850s, work commissioned from forensic statistician Dr Charles Goring in 1913[95] was instrumental in establishing a more aggressive approach to prosecutions of fraud, and ultimately paved the way for establishment of the Fraud Squad in 1946.[96] Goring's legacy also illuminates the complexities which continued to pervade social and legal acceptance of white-collar crime during the early 20th century. In Goring's opinion criminals he identified as 'Fraudulent criminals' had far more in common with the law abiding sections of society than with those who committed other types of crimes, in terms of their 'marriage rates, occupation and other social conditions—including low degrees of alcoholism and higher than average intelligence and education'. They were far removed from 'Habitual criminals' who were incorrigible law-breakers, and who were the furthest removed from ordinary law-abiding citizens.[97] The apparent paradox within Goring's legacy of intensification of response to 'respectable crime' and his thoughts on the criminal activities of those who had more in common with law-abiding citizens than the 'criminal population' can also be read in a way which warns of the challenges lying ahead of the fraud offence, almost a century later.

The contemporary package of responses designed to increase effectiveness in detection and effective prosecution along with 'getting the law right' thus needs to acknowledge that many potential fraudsters will

92 The Trial of Joseph Windle Cole at the Central Criminal Court, 26 October 1854, fully transcribed in Evans, above n.78 at 197–225.
93 See Wheeler *et al.*, above n. 55 at 657.
94 Ibid.
95 C. Goring, *The English Convict: A Statistical Survey* (HMSO: London, 1913).
96 D. J. V. Jones, *Crime, Protest, Community and Police in Nineteenth Century Britain* (Routledge: London, 1982).
97 Goring, above n. 95 at 46.

have much in common with those who are, if not respectable, at least normatively lawful. In the earliest years of the 20th century Goring had some difficulties in reconciling financial criminals as criminals, and today these problems remain for fact-finders within the criminal process who are closest 'to the problem, facing it every week'.[98] For such fact-finders, notwithstanding the destructive capabilities of financial crimes, their acceptance as criminal activities remains problematic. In the case of everyday-life crime Karstedt and Farrall found that 'respectable (and outwardly normatively lawful) people' have difficulties in regarding respectable opportunism, such as insurance fraud, as anything more serious than that. Equally, for many, any perceived social superiority of businessmen is also accompanied by too great a distance from the 'crime scene' located within the commercial sphere.[99]

Making the law work: a way forward and some concluding thoughts

While the Solicitor-General remarked in June 2006 that '[t]he Bill will not be a panacea for preventing fraud' and even that '[w]e should not overrate the capacity of the criminal law alone to solve this or any other problem',[100] this comment appears to have been framed in order to emphasise the new substantive law as part of a strategic 'package' of responses, targeting fraud on a number of fronts. However, it could equally be a prelude to the proposition that the fraud offence will only 'get the law right' if juries and judges are prepared to find that a defendant has acted dishonestly in making a representation, in failing to disclose information while under a legal duty, or has abused a position of trust. This requires societal acceptance that this underlying behaviour is unacceptable, which is in turn premised on achieving much greater perceptual acceptance of fraud as crime than is currently the case. It is here that academic analysis (cast around different perspectives on whether fraud is real crime and should not be treated any differently from other types of crime) which identifies and explains that perceptions are unsettled is a starting-point for clarifying in societal consciousness that fraud is serious and it is unacceptable. However, just as scholars remain divided around the ambiguous nature of white-collar crimes, achieving popular consensus about fraud will remain difficult if pursued on this reasoning alone, which involves making comparisons between different types of crime where 'the notion of disparity assumes we are comparing like with like, and it is precisely this that is so difficult'.[101]

98 Wheeler *et al.*, above n. 55 at 658.

99 Both Levi, above n. 52 and Karstedt and Farrall, above n. 44 were central to the initial observations made in Wilson, above n. 32.

100 *Hansard*, col. 545, 12 June 2006.

101 M. Levi, 'Fraudulent Justice?: Sentencing the Business Criminal' in P. Carlen and D. Cook (eds), *Paying for Crime* (Open University Press: Milton Keynes, 1989) 88 at 100. Although made in the context of sentencing fraudsters, this quote also illustrates the difficulties which are inherent in assuming that comparisons between different types of crime can unproblematically be made.

Thus, while it is important to communicate that there are ambivalences in societal perceptions of fraud, a more constructive way of clarifying that financial crimes have serious consequences for everyone is to focus on explaining *why* fraud is serious conduct which requires the backing of criminal sanctions. At one level this is what the parliamentary discussions on the Fraud Bill were doing, by articulating fraud through the language of harm, and explaining that it needs to be understood that '[d]espite the public perception that most fraud is victimless crime . . . [we] all pay higher prices for security systems, banking services, credit and goods, and higher premiums for insurance'.[102] There is also some evidence that this is being pursued by reference to the capacity for 'business fraud' to affect everyone by destabalising the UK economy and its reputational standing in an increasingly globalised and competitive world marketplace which is dominated by uncertainty and insecurity as well as opportunity. The address of Brian Jenkins, Member for Tamworth, makes particularly striking reference to the considerable reach of harms arising from fraud in his contention that in one respect fraud 'costs the people of our country dear' by hitting 'the pockets of individuals' and creating 'misery for many families'. Equally he described fraud as anything but victimless, and instead an 'insidious and indiscriminate crime which wreaks long-term damage on UK business'.[103]

There does however need to be much fuller discussion of how the need to break down perceptions of fraud as victimless crime might be linked to concerns that the fraud offence might give rise to 'conviction-less' crime. This is vital because, as Jeremy Wright, Member for Rugby and Kenilworth, noted, the new law is seeking to address fraudsters' intentions, rather than seeking to 'measure' the outcomes or consequences of a successful fraud:[104] the fraud offence does so by asking whether the defendant was dishonest. However, the Member's observations as a non-practising barrister that 'juries are well able to deal with the matters put before them in a fraud trial, so long as lawyers putting those matters before them do so in a straightforward way'[105] reiterates a crucial underlying point. This is that the ability of the fraud offence to 'get the law right' requires society—where appropriate—not to shy away from accepting that business men should incur criminal liability for behaving in a manner which is injurious to societal interests[106] and acceptance that 'respectable opportunism' contributes to the huge costs attributable to fraud.

102 *Hansard*, col. 534, 12 June 2006.
103 Ibid. at col. 565 (indeed according to Solicitor-General Mike O'Brien (*Hansard*, col. 534, 12 June 2006) fraud costs the average household £650 per year).
104 Ibid. at col. 563.
105 Ibid.
106 The authors' view is that this message must be accompanied by the equally important one that criminalising business activity must seek to discourage behaviour which can undermine societal interests whilst acknowledging that entrepreneurial activity is vital for our economic and wider societal well-being. The proposition that the limits of lawful business activity must appreciate that legitimate risks will not always 'pay off', and that failed ventures are not necessarily criminally culpable ones, is currently being considered more fully by the authors.

However, messages against tolerance of fraud will have only limited impact unless they are communicated more widely than in *Hansard* reportings alone. What is required instead is extensive and effective communication and education about the harms arising from fraud, and a detailed consideration of how this might be conducted is being made elsewhere.[107] For present purposes, and in anticipation of fuller discussion, one obvious starting point is for those who have recently concluded debating the new law in Parliament to play a key role in communicating the 'problem of fraud' into wider societal spheres. In this vein, the observations made above by Jeremy Wright MP in relation to jurors could be directed to suggest to those in Parliament that public opinion will respond very positively to 'matters put before it' as long as this is done in a 'straightforward way' by key policy-makers. An exploration is currently being made of how media attention given to crime and punishment[108] might be a key element in communication that activities which result in higher prices for 'security systems, banking services, credit and goods, and . . . insurance', and cost UK business by 'undermining confidence in the institutions which are needed to trade and create wealth'[109] are serious crimes, and ones which as a society we have a responsibility to treat as such. Until this happens, serious concerns remain over whether the new fraud offence will 'get the law right' because this message is simply not being communicated either directly enough or sufficiently extensively in popular discourse.

107 And indeed is the subject-matter of the further discussion signposted at n. 75 above.

108 This will consider how parliamentary discussions might be communicated through mass media, and reflect on a number of key considerations pertaining to this. It will look at representations of crime and punishment in mass media and the interactions between popular perceptions and media representations; and also at closely related issues of public sensitivity to media reporting, and how any resulting perceptual awareness might be manipulated in particular directions by specific media reporting.

109 *Hansard*, col. 565, 12 June 2006.